Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)		CC Docket No. 92-90
	)	

To: The Commission

COMMENTS TO FNPRM

I, Dennis C. Brown, hereby file Comments in response to the Commission's Further Notice of Proposed Rule Making (FNPRM) released March 25, 2003 in the above captioned matter. In support of my position, I show the following.

The Commission requested comment on how it can maximize consistency with the rules promulgated by the Federal Trade Commission (FTC). The Commission is required to report to Congress on any inconsistencies between the rules promulgated by the two agencies and on the effect of any inconsistencies on consumers, and persons paying for access to the registry. My comments are directed to those two points.

The Do-Not-Call Implementation Act (DNCIA) imposed certain reporting requirements on the Commission. Those reporting requirements are not limitations on the Commission's actions.

The Telephone Consumer Protection Act (TCPA) was enacted solely to protect telephone

consumers. However inconsistent its actions might have to be with those of the FTC, the Commission cannot carry out its duties under the TCPA simply by deferring to the actions of the FTC. The TCPA neither requires nor admits of any balancing between the protection of telephone consumers and the desires of telemarketers. Accordingly, the balancing approach taken by the FTC is not appropriate to the carrying out of the Commission's duties under the TCPA. The TCPA requires the Commission to consider solely the interests of consumers receiving telephone calls; not the interests of persons making telephone calls. In enacting the DNCIA, Congress did not repeal or modify in any way the TCPA. The Commission remains bound to act in accord with the TCPA and is fully justified in adopting rules which are not consistent with the actions of the FTC, provided only that any such inconsistencies are reported to Congress.

The TCPA imposes certain limitations and certain requirements on telemarketers which are not consistent with certain actions of the FTC, and, in those cases, the Commission must act in accord with the TCPA without regard to the actions of the FTC. For example, while the FTC adopted a safe harbor for the use of predictive dialers, the TCPA does not authorize the Commission to provide any safe harbor for the use of predictive dialers.

Nothing would prohibit the Commission from imposing more narrow limitations of any kind than the FTC has imposed on telemarketing. A telemarketer which acts in compliance with a more restrictive Commission limitation would also be in compliance with the FTC rule. Thus, there would be no inconsistency which the telemarketer could not resolve merely by complying

with the Commission's rule. So long as the Commission's actions provide relief for telephone consumers and do not increase the cost to persons of obtaining access to the FTC registry, a more restrictive limitation placed on telemarketers would not be inconsistent with regard to the concerns expressed by Congress.

Duplication is not inconsistency. There are many instances of duplicative requirements among the various agencies of the federal government. For example, the Federal Aviation Administration requires that a person submit certain information and obtain a determination of no hazard to aeronautical navigation before constructing certain antenna structures. The Commission has its own requirements for antenna structures and requires the submission to the Commission of certain elements of information which are identical to the information required to be submitted to the FAA to obtain grant of an antenna structure registration.

The DNCIA established federal funding for the registry adopted by the FTC. Section 227(c) of the Communications Act of 1934, as amended, 47 U.S.C. §227(c), provides a comprehensive framework for the Commission to establish a do-not-call system, entirely separate and apart from the registry adopted by the FTC. Nothing would prohibit the Commission from adopting an entirely separate registry requirement, even if it might be duplicative of the registry adopted by the FTC. The Commission is free to adopt a separate do-not-call system which would require no federal funds or it could adopt a separate system and request funds from Congress. Provided only that a telemarketer could comply with the requirements of both the FTC and the Commission, there would be no inconsistency between

regulations.

The DNCIA requires certain reporting to Congress of the effect of any inconsistency on persons paying for access to the registry. The DNCIA does not in any way prohibit or restrict inconsistencies. In considering consistency and inconsistency, the Commission should apply the ordinary dictionary definitions of inconsistent and inconsistency, namely, "incompatibility, discrepancy, discordant, at variance, incongruous," New Shorter Oxford English Dictionary, ed. Brown (1993). Provided only that the Commission does not impose a requirement which a person cannot meet while the person also complies with the FTC rules, the Commission can meet its burden to protect consumers under the TCPA and meet the requirements of the DNCIA by acting in the above captioned proceeding without regard to the actions of the FTC.

Conclusion

The DNCIA imposed a reporting requirement on the Commission. It did not limit the Commission's actions in any way. The Commission should carry out its obligations under the TCPA without regard to the actions of the FTC.

Respectfully submitted,

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